CHANGING THE FUNDAMENTAL LAW.

The great importance of this subject will be better appreciated if we first review the scheme of government established by the Constitution of the United States.

No study of constitutional law can approach a scientific method without first distinguishing between the State and the Government, or, to put it in another form, between the sovereign and the agency through which sovereignty functions. "The absence of the clear and correct distinction between state and government is fatal."[1] The independent sovereign is the state. By the term *sovereign* is meant the person or body of persons within the territory of a state, over whom there is, politically, no superior power. Sovereignty is that ultimate power of governing a people from which there is no appeal and beyond which there is nothing but revolution. In the United States this independent sovereignty rests with the people of the United States. The first resolution passed by the Convention that framed the Constitution of the United States, sitting as a Committee of the whole, reads:

> "Resolved, That it is the opinion of this committee that a national government ought to be established, consisting of a supreme legislative, judiciary, and executive."[2]

And the sublime declaration of the Constitution is: "We, the People of the United States * * * do ordain and establish this Constitution for the United States of America."

Mr Chief Justice Marshall, speaking for the Supreme Court of the United States, said:[3]

> "The government of the Union, then * * * is, emphatically, and truly, a government of the people. In form and in substance it emanates from them. Its powers are granted by them and are to be exercised directly on them, and for their benefit."

Ours is a dual government and if, in our conception of it, we draw a horizontal line and place above it all sovereign

[1] Burgess, Pol. Sc., Vol. 2, p. 1.
[2] Elliott's Deb., Vol. 1, p. 151.
[3] McCulloch v. Maryland, 4 Wheat. 316, 404.

powers regulating international relations and conduct, and interstate relations and conduct, and below the line local and purely domestic—other than interstate—relations and conduct, we have above the line the general field of national or federal sovereignty and below it the sovereignty exercised by the state governments; the whole representing a dual government created by a single sovereign, the "People of the United States." As to the state governments, the people of each state respectively are the sovereign and each state government is the agency through which a state's sovereignty functions; while, as to the federal government, all the people of the United States "in their political capacity only,"[4] are the sovereign and the federal government is the agency through which the great and paramount sovereignty is exercised. In each field of political action the people are the sovereign and the governments are agencies. The people of the United States "guarantee to every State in this Union a Republican Form of Government," protection against invasion, and against domestic violence.[5] The Constitution and laws of the United States made in pursuance thereof and all treaties are "the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."[6] The people of the United States, as a political entity, constitute the independent sovereign. Whatever this sovereignty ordains by constitutional amendments becomes the supreme law of the land from which there is no appeal because there is no higher power. The people of the states, respectively, constitute parts of the greater sovereignty; they are dependent sovereignties, represented in all international and interstate affairs and in war by the paramount government of the whole people of the United States. Mr Chief Justice Taney, speaking for the Supreme Court,[7] said:

[4] Penhallow v. Doane's Admr's, 3 Dallas 54.
[5] Article IV., Section 4.
[6] Article VI., Paragraph 2.

"When the present United States came into existence, under the new Government, it was a new political body, a new Nation, then for the first time taking its place in the family of nations."

Mr Justice Miller, speaking of the establishment of the Federal Constitution, said: "It was then that a Nation was born."[8]

"The whole is greater than its parts" is a truism which applies with full force to the sovereignty of the United States. Speaking through that learned jurist, Mr Justice Story, the Supreme Court[9] said:

"The constitution of the United States was ordained and established, not by the states in their sovereign capacities, but emphatically, as the preamble of the constitution declares, by the people of the United States. There can be no doubt that it was competent to the people to invest the general government with all the powers which they might deem proper and necessary; to extend or restrain these powers according to their own good pleasure, and to give them a paramount and supreme authority. As little doubt can there be that the people had a right to prohibit to the states the exercise of any powers which were, in their judgment, incompatible with the objects of the general compact; to make the powers of the state governments, in given cases, subordinate to those of the nation, or to reserve to themselves those sovereign authorities which they might not choose to delegate to either. The constitution was not, therefore, necessarily carved out of existing state sovereignties, nor a surrender of powers already existing in state institutions, for the powers of the states depend upon their own constitutions; and the people of every state had the right to modify and restrain them, according to their own views of policy or principle."

This scheme of a consolidated government was recognized by Mr Patrick Henry, perhaps the ablest, certainly the most eloquent, opponent to the adoption of the preamble of the Constitution. In the constitutional convention of Virginia he said:

"And here I would make this inquiry of those worthy characters who composed a part of the late Federal Convention. I am sure they were fully impressed with the necessity of forming a great consolidated government, instead of a confederation. That this is a consolidated government is demonstrably clear; and the

[7] Scott v. Sanford, 19 How. 293, 441.
[8] Miller on the Constitution, p. 83.
[9] Martin v. Hunter's Lessee, 1 Wheaton 304, 324.

danger of such a government is, to my mind, very striking. I have the highest veneration for those gentlemen; but, sir, give me leave to demand, what right they had to say, *We the people?* My political curiosity, exclusive of my anxious solicitude for the public welfare, leads me to ask, who authorized them to speak the language of, *We the people*, instead of, *We the States?*"[10]

In view of the plenary sovereignty of the people of the United States, it is vital to the permanency of our dual form of government that this unlimited sovereignty may not unwittingly, or through ignorance of the issue, by constitutional amendments, disturb the true balance of power by vesting in the Federal Government powers which, under the general scheme of the dual government, belong to the state governments. To say the least, the supreme sovereignty should not draw to itself the local or domestic powers without having full knowledge of, and acting intelligently upon, such proposals.

Constitutions are legislation by the sovereign, not by the legislatures created by the sovereign to legislate upon municipal affairs. Mr Justice Patterson answers the question "what is a constitution," in striking language:[11]

"It is the form of government, delineated by the mighty hand of the people, in which certain first principles of fundamental laws are established. The Constitution is certain and fixed; it contains the permanent will of the people, and is the supreme law of the land; it is paramount to the power of the Legislature, and can be revoked or altered only by the authority that made it. The life-giving principle and the death-doing stroke must proceed from the same hand."

Mr Bryce says:[12]

"When we talk of a Constitution, of a State or Nation, we mean those of its rules or laws which determine the form of its government and the respective rights and duties of the government towards the citizens, and of the citizens towards the government."

Mr Cooley says:[13]

"A Constitution is "that body of rules and maxims in accordance with which the powers of sovereignty are habitually exercised."

[10] Elliott's Deb., Vol. 3, p. 22; Jameson, p. 44.
[11] Vanhorne's Lessee v. Dorrance, 2 Dallas 304, 308.
[12] American Commonwealth, p. 350.
[13] Constitutional Limitations, 7th ed., p. 4.

Mr Jameson says:[14]

By the Constitution of a commonwealth is meant primarily its makeup as a political organization, that special adjustment of instrumentalities, powers, and functions by which its form and operation are determined.

The people of the United States, therefore, acting for the entire territory of the United States, may prescribe by their Constitution the form and jurisdiction of every government within the territory. The governments are the creatures of the sovereign. Mr Justice Patterson, in the case cited, says:

"What are Legislatures? Creatures of the Constitution; they owe their existence to the Constitution; they derive their powers from the Constitution; it is their commission; and, therefore, all their acts must be conformable to it, or else they will be void. The Constitution is the work or will of the People themselves, in their original, sovereign, and unlimited capacity. Law is the work or will of the legislature in their derivative and subordinate capacity. The other one is the work of the Creator, and the other of the Creature. The Constitution fixes limits to the exercise of legislative authority, and prescribes the orbit within which it must move."

If we may quote again from Mr. Justice Story in the case cited, where it is said:

"As little doubt can there be that the people had a right to prohibit to the states the exercise of any powers which were, in their judgment, incompatible with the objects of the general compact; to make the powers of the state governments, in given cases, subordinate to those of the nation, or to reserve to themselves those sovereign authorities which they might not choose to delegate to either."

The Federal Government guarantees to the states a "republican form of government," and the "form" is a political question "solely committed by the Constitution to Congress."[15]

Mr Chief Justice Marshall, speaking for the Supreme Court, said:[16]

"That the people have an original right to establish for their future government such principles as in their opinion shall most conduce to their own happiness is the basis on which the whole American fabric has been erected."

[14] Constitutional Conventions, Sec. 63.
[15] Pacific Telephone Co., v. Oregon, 223 U.S. 118, 133.
[16] Marbury v. Madison, 1 Cranch 137, 176.

Having now before us in clear review the general scheme of our government, we approach the question whether the present method of changing the fundamental and paramount law of the land should be changed. The people of the United States have the power to change the Constitution by any method they adopt. This is not denied. But the question now presented is whether the present method is the one that should prevail in the future, or should we return to the procedure followed in the establishment of the original Constitution. The method pursued in the adoption of the original Constitution is well stated by Chief Justice Marshall:[17]

"The convention which framed the constitution was indeed elected by the state legislatures. But the instrument, when it came from their hands, was a mere proposal, without obligation, or pretensions to it. It was reported to the then existing Congress of the United States, with a request that it might "be submitted to a convention of delegates, chosen in each state by the people thereof, under the recommendation of its legislature, for their assent and ratification." This mode of proceeding was adopted; and by the convention, by Congress and by the state legislatures, the instrument was submitted to the people. They acted upon it in the only manner in which they can act safely, effectively, and wisely, on such a subject, by assembling in convention. * * * * * * * * * * From these conventions the constitution derives its whole authority. The government proceeds directly from the people; is "ordained and established" in the name of the people; and is declared to be ordained, "in order to form a more perfect union, establish justice, insure domestic tranquillity, and secure the blessings of liberty to themselves and to their posterity."

By the method pursued in the adoption of the original Constitution there was a referendum to the people. With a full knowledge of the Constitution proposed the people elected representatives to the state constitutional conventions. The delegates chosen represented the views of the people and acted for them. It was through independent bodies, without succession, that the Constitution was proposed and adopted.

In providing for amendments, Article V of the Constitution reads:

[17] McCulloch v. Maryland, 4 Wheat. 316, 403.

"The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three-fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress."

There are two methods of proposing amendments to the Constitution: first, the Congress, whenever two-thirds of both Houses may deem it necessary, may propose amendments; and, second, on application of the legislatures of two-thirds of the several states the Congress shall call a convention for proposing amendments. There are also two methods of acting upon proposals: first, ratification by the legislatures of three-fourths of the several states; and, second, by conventions in three-fourths thereof, as the one mode or the other may be proposed by the Congress. The second method of proposing and adopting amendments follows the procedure in the establishment of the original Constitution. The method of proposing and ratifying by legislative agencies—the Congress and the legislatures of the several states—was an innovation. The reasons for this innovation are not clearly nor satisfactorily stated in the debates. It may have been a compromise with those who, like Patrick Henry, thought the Constitution of the United States should be the work of the states; or, the expense and difficulty in travelling long distances at that time may have influenced the convention in inserting this provision in Article V. Whatever may have been the reasons then that moved the convention, the question now is, Should this method be continued under present conditions?

A study of the debates in the state constitutional conventions which adopted the original Constitution clearly shows that action by legislative bodies in calling conventions, proposing and adopting amendments, was not ordinary legislation by legislative bodies. As stated by a speaker in the Virginia convention of 1829:

"No one ever supposed that the Acts to take the sense of the people, and to organize a Convention, were Acts of ordinary legislation; or, properly speaking, Acts of legislation at all, as little so as an election by that body of any officer. * * * The truth is, the action of the ordinary legislature on this subject * * * is not of the character of ordinary legislation. It is in the nature of a resolve or ordinance adopted by the agents of the people, not in their legislative character, for the purpose of collecting and ascertaining the public will, both as to the call and organization of a Convention, and upon the ratification or rejection of the work of a Convention."[18]

But the fact is that the same pressure and considerations which operate in securing ordinary legislation are present and cogent in securing proposals and ratification of amendments to the Constitution. Where the proposal and the ratification are by legislative bodies it cannot be said that the people, with a full knowledge of the amendments suggested and proposed, have in any sense acted directly upon the amendments proposed. The members of a congress proposing an amendment to the Constitution were not elected by the people with reference to such action. Nor were the members of the state legislative bodies elected by the people with reference to representing the people upon any proposed amendment to the Federal Constitution. The act of ratifying, under this method of amending the Constitution, is clearly the act of legislative bodies acting, not in the capacity of legislators, but, theoretically, as delegates of the people to a constitutional convention. But, as already noted, the action of the people in electing delegates to constitutional conventions has reference to specific needs or demands for changes in the fundamental law. The representatives are chosen upon consideration of their views, or political wisdom, regarding amendments suggested or proposed which have been discussed and considered by the people.

When we consider the fact that grave changes in the Federal Constitution may result in taking from the states powers which have always been considered local and domestic,

[18] Deb. Va. Conv. 1829, p. 887; Deb. Mass. Conv. 1820, p. 407; Jameson, p. 506.

wholly under the jurisdiction of the state governments, and vesting such powers in the federal government, it is apparent that the subject should receive full and intelligent consideration by the sovereign people. When jurisdiction of a matter has been claimed by Congress, but not sustained by the courts as within constitutional authority, such jurisdiction may be secured through a constitutional amendment proposed by Congress and ratified by the legislature of three-fourths of the states; and such action, perhaps disturbing the true balance of power in the dual government, is secured without any direct action by the people and by pressure and practices not unfamiliar in securing ordinary legislation. Take for illustration the 18th amendment—and I am not here discussing the merits of that amendment—it had been decided in many cases that the regulation of the manufacture, sale, and transportation in intrastate commerce of liquors for beverage purposes was exclusively within the control of the states.[19] The subject was clearly within the police power of the states. Congress could and did, under the Interstate Commerce Act, exclude from interstate commerce liquor when consigned to states that had forbidden its manufacture and use but in so doing the court expressly recognized that Congress had no power to prevent the manufacture and sale within a state.[20] The only way in which the federal government could secure jurisdiction over the manufacture and sale within a state was by an amendment to the federal constitution vesting the control of this subject in the federal government. Congress therefore proposed an amendment, which was adopted by the legislatures of three-fourths of the states, and by that act the federal jurisdiction was extended to, and the states' jurisdiction was withdrawn from, this subject.[21] It will not be claimed that the members of

[19] In re Rahrer, 140 U. S. 545, 554–5; Matter of Heff, 197 U. S. 488, 505; South Carolina v. United States, 199 U S. 437, 453–4.

[20] Wilson Act, 26 Stat. 313; Rhodes v. Iowa, 170 U. S. 412; Adams Express Co. v. Commonwealth, 214 U. S. 218; Louisville & N. R. Co. v. Cook Brewing Co., 223 U. S. 70; Webb-Kenyon Act, 37 Stat. 313, c. 728; Clark Distilling Co. v. West Md. Ry. Co., 242 U. S. 311; Reed Amendment, 39 Stat. 1058, 1069, c. 162; State v. Hill, 248 U. S. 420.

[21] State of Rhode Island v. A. Mitchell Palmer, Atty. Genl. (and other cases), 253 U.S. 350.

Congress who proposed this amendment were elected by the people with reference to such action; nor can it be shown that the state legislators who voted to ratify the amendment were elected by the people with reference to taking such action. By this I do not mean that the subject of prohibition was not publicly discussed or that the 18th amendment was surreptitiously obtained or secured, but the members of the legislative bodies proposing and ratifying the amendment were not elected with a view of expressing the wish of the people upon this question. It may be doubted whether this amendment would have been adopted if the people had voted directly upon it. While the majority of the people of the states may have been, and I think were, in favor of prohibition, it is very doubtful whether they would have voted to transfer the jurisdiction of that subject from the states to the federal government. What was accomplished with reference to the adoption of the 18th amendment may be accomplished with reference to any subject now under the police power of the states. In the child labor cases[22] the Supreme Court, speaking through Mr Justice Day and denying the power of Congress to exclude from interstate commerce products produced by child labor, said:

"The far reaching result of upholding the act cannot be more plainly indicated than by pointing out that if Congress can thus regulate matters entrusted to local authority by prohibition of the movement of commodities in interstate commerce, all freedom of commerce will be at an end, and the power of the States over local matters may be eliminated, and thus our system of government be practically destroyed."

But this subject could be taken from the states by an amendment to the Federal Constitution proposed by Congress and adopted by the legislatures of a requisite number of states without any direct or intelligent action by the people. This is also true of various matters about which reforms are proposed and insisted upon by groups of people. In a very able brief, filed in the Supreme Court of the United States in the cases involving the 18th amendment by Hon.

[22] Hammer v. Dagenhart, 247 U. S. 251, 276,

Elihu Root, William D. Guthrie and associates, insisting that Article V does not authorize legislative bodies to adopt amendments to the Federal Constitution which would take away the police power of the states, it is said:

"If this amendment be valid, the principle which it embodies and the tendency which it establishes and legalizes would authorize the most far-reaching and revolutionary alterations in our governmental system. The right to manufacture, sell and transport in local or intrastate commerce tobacco, condiments, coffee, grain, meat, cotton, or any other products, which three-fourths of the several States at any time deem objectionable, could then unquestionably be prohibited by constitutional amendment. The right of the States to establish and enforce social distinctions between the races and prevent their intermarriage, which a number of our States firmly believe vital to their peace, order and happiness; the right of the States to regulate any other domestic relation; the right of the States to regulate strikes and lockouts; the right of the States to levy and collect their own taxes for their own purposes; the right of the States to forbid the use of child labor or regulate the hours of labor in the factories within their respective borders; the right of the States to enact employers' liability and workmen's compensation laws for the benefit of their inhabitants,—in a word, the entire right of each of the States to regulate the life, conduct and intrastate affairs and business of its citizens in accordance with its own needs and its own views—may all be destroyed by the action of two-thirds of a quorum of both Houses of Congress and the concurrence of the three-fourths of the legislatures of the States, representing it may be a minority of the people of the United States."

I am not suggesting that there is an immediate danger that these sweeping changes will be proposed, or if proposed ratified by the requisite number of state legislatures, but am simply stating the possibility of changes by constitutional amendment which, as Mr Justice Day states, would have the effect of eliminating the power of the states over local matters and "thus our system of government be practically destroyed."

We cannot shut our eyes to the fact that, while proposing or ratifying an amendment to the Constitution is not a legislative act, the influences which secure legislative action are brought to bear in securing proposals and ratification of amendments to the Federal Constitution. If we consider

the action of political parties upon this subject we shall find, without doubt, that an amendment to the Constitution is not a major consideration in electing representatives, either to Congress or to the state legislatures. The selection of a candidate favorable to an amendment is secured by a minority group in many, if not in most, cases. Take, for example, a district where there are 40,000 legal voters nearly equally divided between the two great parties. The interest of a group of persons leads to a union of 5,000 voters in such a district in favor of a particular amendment. To these voters the amendment to the Constitution is of paramount importance over all other political questions at the election. The representatives of this group offer to cast this block of votes to either party, regardless of all other questions, if a representative is selected who will favor the amendment. Without considering or questioning the methods of the party leaders the proposition is accepted by one party and it puts up a man who is in favor of the amendment and he is elected. It cannot be said that in that district there were a majority of the people in favor of the amendment. Five thousand voters held the balance of power between the two great parties and turned the election by their votes. Bolshevism is " a rule by a minority." Changing the fundamental law by the action of small groups in election districts is a rule by minorities. Such rule is in direct opposition to, and destructive of, our scheme and theory of government. No matter how good the cause, "They that go about by disobedience to do no more than reforme the commonwealth shall find that they do thereby destroy it."[23] This method of securing representatives is increasing. It was the boast of the great labor leader that labor secured the defeat or election of fifty members of Congress at the last general election. How was this done, by open debate? No, by the solid labor vote, in Congressional districts, acting solely with reference to its interest and disregarding all other issues. This same method by

[23] Hobbs, Leviathan.

well organized groups may secure representatives in Congress and state legislatures who, under the present method, may obtain the proposal and ratification of any amendment to the Federal Constitution, transferring from the states to the federal government powers not heretofore vested in Congress. These movements or reforms, as they are called, may extend to subjects and produce results under the present method of amending the Constitution, which could not be obtained if an appeal had to be made to the popular vote.

Another objection to the present method is that legislators are men who, in most cases, are making a career of public life. These legislative bodies are continuing institutions and their members are seeking reelection. It is a well known fact, and boasted of by some reformers, that members have been compelled to vote upon certain questions by threats that if they did not so vote, groups of voters in their districts would defeat their reelection. Such influences cannot be brought to bear successfully upon delegates in a constitutional convention. The convention has no succession. The delegates are reasonably independent of such influences and considerations which do, more or less, affect members of a legislative body. A member of a state legislature known to have voted against his personal convictions upon the ratification of the 18th amendment was asked why he did so and he replied that he was not prepared to face political banktuptcy. These are modern developments in our political life[24] and such influences should not be permitted to affect so serious a proposition as the adoption of amendments to the Constitution of the United States which may materially change the balance of power in our dual system of government.

It cannot be doubted that constitutional law, like ordinary legislation, must keep pace with economic and social changes within the nation. The Constitution should not be a fetish, but fundamental law subject to change and amendment by its creator, when changes are required to

[24]See article entitled, Group "Direct Action" on Congress, by Mr. George Perry Morris, Review of Reviews, September, 1920.

properly meet new social and economic conditions. Even the construction given to parts of the Constitution by the Supreme Court of the United States may render those parts unsatisfactory to the people, and whether the provisions as construed are to continue may be a vital question for referendum.

It may be that there should be constitutional conventions held at regular periods, say every ten years after the taking of the census, for the purpose of determining whether amendments or changes in the Constitution are required.

Other objections can be stated to the use of legislative bodies in proposing and ratifying amendments to the Federal Constitution, but enough has been said to open the discussion as to whether the time has not come when we should amend Article V and provide that proposals for amendments be by a constitutional convention duly called to consider this subject, composed of delegates elected by the people of the various states, and that proposals by such conventions should be submitted to the people in each state for a direct vote thereon, giving a chance to adopt or reject any amendment or all the amendments proposed. We now elect our senators by popular vote. Why should not amendments to the Federal Constitution be voted upon by the people as are amendments to state constitutions? We have general elections at stated periods and the people's will can be expressed upon proposed amendments with very little additional expense. The Constitution was ordained by the people of the United States; the form of government and the distribution of sovereign powers in this dual government was determined by them in the exercise of their unlimited sovereignly, and no change should be made in the fundamental law without their direct and well-informed act

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